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1 on the case.

2 Q. And procedurally speaking in a death case,  
3 you receive a report from the mitigation expert and  
4 then you take that report and then you incorporate  
5 that into your decision-making process on what tests  
6 to administer; correct?

7 A. Most of the time, yes. Occasionally, the  
8 mitigation report may come in later, and then you have  
9 to decide is there something else I need to do?

10 Q. On all those cases that you've done the  
11 psychological assessment for the capital case, that  
12 was all completed prior to trial; correct?

13 A. Way before trial.

14 Q. Like a year, six months? Well before trial?

15 A. Well before trial.

16 Q. You heard Dr. Martinez's testimony today and  
17 you saw that summary of his records about when he  
18 began the testing. Did that cause you alarm?

19 A. Yes.

20 Q. Because of the untimeliness in the  
21 investigation?

22 A. Yes.

23 Q. Now, do you have your report up there with  
24 you, Dr. Murphey?

25 A. Yes.

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1 Q. Could you please tell us what testing you  
2 administered to John Henry Ramirez in this case?

3 A. Yes. Clinical and mental status interview,  
4 the Wechsler Abbreviated Scale of Intelligence.

5 Q. Can't quite hear you, Doctor.

6 A. I'm sorry. Clinical and Mental Status  
7 Interview, the Wechsler Abbreviated Scale of  
8 Intelligence, Quickview Social History, the Minnesota  
9 Multiphasic Personality, Personality Inventory-2  
10 Reformulated, the Millon Index of Personality Styles,  
11 and the Symptom Checklist - Revised, review of  
12 collateral records, and telephone interview with  
13 Dr. Troy Martinez.

14 Q. Now, that testing that you performed, what  
15 was your general conclusion about John Henry's state  
16 of depression?

17 A. That it was extremely high.

18 Q. And what's that indicate to you? In other  
19 words, why do we care if his depression is high?

20 A. Because it's going to influence his thinking.

21 Q. In a negative way or a positive way?

22 A. In a negative way.

23 Q. And how so?

24 A. Well, I guess it would be similar to if we  
25 put on very dark-colored glasses. We would view the

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1 world in a distorted and darker way than might be the  
2 case.

3 Q. Now, you heard Dr. Martinez testify today  
4 that on December 7th, 2008 when he met with John Henry  
5 at the jail, that from John Henry's point of view at  
6 the time, his conclusions seemed logical and sound.  
7 Did you hear that testimony today?

8 A. Yes, yes.

9 Q. Now, what is your thoughts about that?

10 A. Well, on -- for example, on the MMPI-2, I  
11 have never seen suicidal -- there's a scale called the  
12 suicide index. I've never seen one as high in my  
13 years of practice.

14 Q. As John Henry scored?

15 A. That's correct. So what it tells me is that  
16 while he may not be crying and have obvious visual  
17 signs of depression, that his thinking is certainly  
18 suicidal -- highly suicidal, and there were  
19 cynicism -- other scales consistent with that that  
20 also were in the clinical range.

21 Q. Now -- by the way, did you review  
22 Dr. Martinez's report dated August 31st of 2011?

23 A. Yes, I did.

24 Q. And did you --

25 BY MR. GROSS: May I approach, Your

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1 Honor?

2 THE COURT: Yes, sir.

3 Q. (BY MR. GROSS) Did you see in there on page 4  
4 of 5 where Dr. Martinez says that -- that John Henry  
5 Ramirez told Dr. Martinez that if he wasn't so  
6 depressed, he probably would make a different decision  
7 about this case?

8 A. Yes.

9 Q. And in context, Dr. Martinez was looking to  
10 see if John Henry was okay to waive this writ; right?

11 A. That's correct.

12 Q. But the key I was wanting to note from you  
13 about is how accurate that is in a statement by John  
14 Henry? If someone is that depressed, does that really  
15 affect their decision-making process?

16 A. Absolutely.

17 Q. And that's something that Dr. Martinez saw on  
18 August 31st, 2011; correct?

19 A. Correct.

20 Q. And it's consistent with what your testing  
21 showed all the way back in 2009; right?

22 A. Yes.

23 Q. Now if you would please look at page 42 of  
24 your report.

25 A. Okay.

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1 Q. In that second paragraph there --

2 A. Okay.

3 Q. -- the paragraph that begins,

4 "Dr. Martinez reported."

5 A. Yes.

6 Q. That paragraph deals with Dr. Martinez's  
7 interview of John Henry Ramirez in the jail on  
8 December 7th, 2008; correct?

9 A. Yes.

10 Q. Had you been the forensic psychologist on the  
11 case and tasked with making a determination as to  
12 whether or not John Henry could waive mitigation,  
13 given the fact he had just been convicted of capital  
14 murder two days before and just given the fact that  
15 his father had testified at sentencing and given his  
16 history in the Marine Corps; right?

17 A. Yes.

18 Q. Cause -- what was his history, by the way, in  
19 the Marine Corps, psychologically?

20 A. Well, there was a significant suicide attempt  
21 while in the Marine Corps.

22 Q. And what did the -- the health care providers  
23 in the Marine Corps, the psychologists and  
24 psychiatrists, how genuine did they perceive John  
25 Henry's suicidal ideations and attempts at suicide?

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1 A. As very genuine.

2 Q. So there was no question that he was suicidal  
3 and depressed in the Marine Corps; right?

4 A. That's correct.

5 Q. And given all the history you saw of the  
6 depression, if you put yourself in Dr. Martinez's  
7 shoes at the jail on December 7th, 2008, making a  
8 determination as to whether someone was able to make a  
9 rational decision, what would you have done  
10 psychologically to help you decide whether or not the  
11 Defendant could make such a decision?

12 A. Psychological testing and a psychiatric  
13 evaluation regarding possible medication.

14 Q. And what kind of psychological -- further --  
15 I mean, he did psychological testing, right, the PAI?

16 A. Well, it was invalid.

17 Q. And why?

18 A. Well, I don't know why. He just reported in  
19 his report that the PAI was invalid, so there was no  
20 data.

21 Q. Which would cause you even more concern;  
22 right?

23 A. Yes.

24 Q. So Dr. Martinez's file established the only  
25 test he administered to John Henry was for whatever

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1 reason invalid; correct?

2 A. Yes.

3 Q. And so did Dr. Martinez have any kind of  
4 psychological testing basis whatsoever to make a  
5 determination as to whether or not John Henry was  
6 competent to make that decision on December 7th?

7 A. No, no objective data.

8 Q. You mentioned that you would have done  
9 testing. What kind of testing would you have done?  
10 What you did in this case?

11 A. Yes.

12 Q. What did the testing that you performed in  
13 this case show besides that high level of -- of  
14 suicidal ideation?

15 A. Well, it was very consistent with the  
16 developmental history, family problems, issues with --  
17 let me just look at it and I can tell you better.  
18 Clinical elevation on a scale called demoralization  
19 somatic complaints.

20 Q. And what does that tell you?

21 A. Feeling demoralized, feeling very badly about  
22 himself.

23 Q. And does that potential affect one's  
24 decision-making ability?

25 A. Yes.

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1 Q. What else did you find?

2 A. That he had had some anti-social behavior.

3 He had an elevation on hypomanic activation.

4 Q. And what does that tell you?

5 A. Well, need to rule out a bipolar disorder  
6 would be my first thought.

7 Q. And, of course, bipolar disorder is a severe  
8 mental disease or defect; correct?

9 A. That's correct.

10 Q. And it could also affect decision-making  
11 ability; right?

12 A. Yes. An elevation on malaise on neurological  
13 complaints and --

14 Q. Which tells you what?

15 A. That he is complaining of bodily problems,  
16 thinking problems, other problems, again, the suicidal  
17 depth ideation almost off the chart. It's as high as  
18 it can go. Helplessness, hopelessness, self-doubt,  
19 anxiety elevations, that he had juvenile conduct  
20 problems, had problems with substance abuse, family  
21 problems, had interests in mechanical, physical  
22 things. Those are the --

23 Q. So what do these things tell you about John  
24 Henry's ability to make a -- a rational, logical  
25 decision on whether to waive mitigation?

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1 A. Well, this is a very depressed man making a  
2 decision from that view, the view of a depressed man.

3 Q. And when you look at page 42 of your report  
4 in that second paragraph, towards the middle --

5 A. Okay.

6 Q. "-- Dr. Martinez did not indicate having  
7 considered that John was clinically suicidal during  
8 this time frame because of an undiagnosed mental  
9 disorder. When John made this essentially suicidal  
10 statement, Dr. Martinez did not propose any further  
11 specific testing for depression. In fact,  
12 Dr. Martinez never attempted specific testing for the  
13 presence of depression or any other serious mental  
14 disorder. John's statement that he thought the  
15 presence of the jury might do the opposite of his  
16 request to ask for the death penalty is not a logical  
17 statement. However, Dr. Martinez did not consider the  
18 statements potentially reflect of any distortion in  
19 John's thought process. In this evaluator's opinion  
20 --" meaning yours "-- the evaluation of John's  
21 decision to forego testimony about mitigating  
22 circumstances was badly flawed. It is more likely at  
23 the time of making this decision John was suicidal and  
24 irrational based on the data reported by  
25 Dr. Martinez."

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1                   What -- what do you mean by all that in a  
2 nutshell? That Dr. Martinez screwed up and should  
3 have done more testing?

4                   A. Well, obviously, that's not language I'm  
5 going to choose to use, but what I would use is that I  
6 think it did not meet the standard that most  
7 psychologists would employ if they were going to offer  
8 an opinion about somebody's mental function.

9                   Q. So -- so that did not meet the standard of  
10 care that would be recognized in your -- in your  
11 psychological field; correct?

12                  A. I -- yes, that's correct.

13                  Q. And as a result of that, is it basically your  
14 conclusion that they missed the boat, that John was  
15 not able to make a rational decision to waive  
16 mitigation?

17                  A. That's my opinion, yes.

18                  Q. And what other opinions did you have in this  
19 case, Dr. Murphey?

20                  A. Well, that John is a bright man with a  
21 horrific, absolutely horrific early childhood, that  
22 there are possible post-traumatic issues for him,  
23 combined with serious substance abuse, which is  
24 self-medicating pain, and that had he grown up in a  
25 different environment, he probably would be a very

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1 productive member of society given his native  
2 intelligence.

3 Q. And this -- these opinions that you have  
4 garnered on John Henry are based on the independent  
5 affidavits provided by our mitigation expert,  
6 Mr. Byington; correct?

7 A. Yes.

8 Q. And all the records that you reviewed?

9 A. Yes.

10 Q. But more importantly, wouldn't you agree,  
11 that -- that they're confirmed by the family member  
12 affidavits that Gerry Byington obtained in this case?

13 A. Yes.

14 Q. And the last question for you, all of the  
15 concerns you have about John Henry's upbringing and  
16 abusive childhood, those were all right out of the  
17 records you reviewed in this case; correct?

18 A. Yes.

19 Q. And what you're outlining on those pages we  
20 talked about in your report?

21 A. Yes.

22 Q. And the last question is how does abusive  
23 childhood upbringing potentially affect one's  
24 decision-making processes down the road?

25 A. Well, we know that early severe abuse simply

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1 rewires brain functioning, and that people who suffer  
2 that, in fact, may never be really well; that it is  
3 devastating, and the earlier and the more severe, the  
4 more that seems to be the case.

5 Q. And you agree that that's what John Henry  
6 suffered from --

7 A. Yes.

8 Q. -- in part? Thank you, ma'am.

9 MR. GROSS: No further questions, Your  
10 Honor.

11 THE COURT: All right, cross?

12 MR. NORMAN: Yes, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. NORMAN:

15 Q. Doctor, is being suicidal in itself a  
16 clinical diagnosis indicating a mental illness?

17 A. There's no DSM diagnosis for suicidal  
18 ideations, no.

19 Q. So isn't it possible that a rational mentally  
20 healthy person could logically choose a course of  
21 conduct that would, in effect, end his life -- his or  
22 her life?

23 A. Not in my opinion given good health.

24 Q. So someone who's in good health could never  
25 choose a course of conduct that would end their life,

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1 logically choose that?

2 A. That's correct.

3 Q. So as -- if I'm understanding you, Doctor, no  
4 one in Mr. Ramirez's situation even if he were  
5 completely healthy, even if he had no symptoms at all  
6 of depression, let's say, no one could logically have  
7 made the decision he made to not present a -- a  
8 mitigation case cause that would in effect end his  
9 life?

10 A. Well, in fact, suicidal ideation is very  
11 connected to hopelessness, that a person can see  
12 nothing good about their life and no chance for that  
13 to change. And that is kind of the key, if you read  
14 literature on who takes their life, most people are  
15 wanting out of the pain that they're in; and I think  
16 there is always a level of depression in that.

17 I don't see a happy person going on in  
18 their life coming in and saying, you know, "I think  
19 I'll end my life today, just feels like a good day to  
20 do that."

21 Q. Are you saying then it would be illogical for  
22 someone, let's say, with a severe form of cancer  
23 suffering greatly to decide to discontinue treatments  
24 and in effect die earlier rather than suffer the pain  
25 of that disease? That would not be a logical

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1 decision?

2 A. Absolutely, I'm not saying that. In that  
3 situation, that might be a very logical and humane and  
4 well thought-out decision.

5 Q. So it is possible for a logical person to  
6 decide on a course of conduct to end their life in a  
7 shorter period of time?

8 A. Yes.

9 Q. Okay. Doctor, you mentioned that  
10 Dr. Martinez -- Martinez's report that there was a PIA  
11 (sic) that was not completed. Isn't it true that the  
12 results were invalid due to overendorsement of signs  
13 and symptoms of psychopathology ruling the remainder  
14 of the instrument unintelligible?

15 A. Yes.

16 Q. So could you explain that to us in layman's  
17 terms?

18 A. Yes. All good psychological instruments have  
19 validity scales, the MMPI-2 by far having the most  
20 stringent validity scales. But the PAI does have I  
21 think three. It has at least two and maybe three,  
22 so nothing like some other test instruments. But if  
23 you endorse over a certain number of problems, then it  
24 will come back as invalid.

25 Q. And could you explain -- when you say

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1 overendorse, could you explain that in layman's terms,  
2 Doctor?

3 A. Sure. If you admit to too many problems.

4 Q. So, in other words, this is part of lack of  
5 cooperation by the subject; isn't that correct?

6 A. No.

7 Q. Okay. Could you explain that, Doctor?

8 A. I think you'll find that the MMPI-2 that I  
9 gave him that there was also a tendency to over-report  
10 symptoms. I think in its own way it is a cry for  
11 help. It is a way of saying, "I'm sick. I am very  
12 sick. I don't think anybody is listening, look at how  
13 many problems I have."

14 Q. Well, in spite of being a cry for help, I  
15 mean, isn't it true that it's basically saying you're  
16 not being entirely truthful to the examiner?

17 A. That is one possible conclusion that a person  
18 can make if you think somebody is malingering in some  
19 way. The other is a cry for help. And it simply is  
20 up to the person evaluating the person to try to  
21 decide what they think that validity scale represents.

22 Q. And is it true that you didn't give him any  
23 specific tests to rule out malingering?

24 A. Well, certainly the MMPI-2 has ten validity  
25 scales; and if he were malingering, that would be the

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1 best instrument probably to catch that. There's  
2 another test that would be the second called the Test  
3 of Memory Malingering, or something like that that's  
4 sometimes used, but there was no reason to -- to  
5 suspect that Mr. Ramirez was malingering.

6 Q. Well, Doctor, on page 2 of your report, you  
7 also come to the conclusion Mr. Ramirez was attempting  
8 to appear more pathological than the case may be?

9 A. Yes. He was definitely going to tell me  
10 everything negative about himself and nothing  
11 favorable.

12 Q. Isn't that a form of malingering, Doctor?

13 A. I think it's a cry for help.

14 Q. It could also be a form of malingering,  
15 couldn't it?

16 A. It could be. It's my opinion that it is not,  
17 and that -- that is how I viewed Mr. Ramirez.

18 Q. Isn't it true that Mr. Ramirez stated that he  
19 wanted to be put to death because he didn't want to  
20 spend the rest of his life on death row?

21 A. Yes.

22 Q. Is there anything illogical about someone  
23 choosing death as more acceptable than life in prison?

24 A. I've never been in prison. I don't have a  
25 basis to compare that, but I do think that a decision

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1 from a depressed person is not a rational decision. I  
2 mean, we don't put people to death who are not  
3 competent enough to be put to death. And I don't  
4 think that Mr. Ramirez is a person capable of making a  
5 rational decision.

6 Q. Doctor, are you familiar with the  
7 standards -- the legal standards for competency to  
8 stand trial?

9 A. For competency to stand trial?

10 Q. Yes.

11 A. Yes, I am, and I'm certified to perform  
12 competency evaluations.

13 Q. Did you perform such evaluation on  
14 Mr. Ramirez?

15 A. No.

16 Q. Do you have any reason to believe he was  
17 incompetent to stand trial?

18 A. No.

19 Q. So he at least met the base requirements for  
20 being competent to stand trial?

21 A. I didn't do such evaluation on him. I was  
22 not asked to perform that type of evaluation.

23 Q. Well, let me ask -- I'm sorry.

24 A. I found no reason to suspect that he was not,  
25 but I did not perform a competency evaluation.

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1 Q. Okay. Well, let me just go over the two --  
2 the two particular standards there. You found nothing  
3 to indicate that at the time of trial he didn't have  
4 the ability to consult his lawyers with a reasonable  
5 degree of rational understanding; isn't that correct?

6 A. I didn't see him before his trial.

7 Q. I'm asking you, you found nothing to suggest  
8 that he didn't have that? In other words, you had no  
9 information that would challenge that?

10 A. I never spoke with the attorneys who  
11 conducted his trial so I would have no information  
12 about that at all.

13 Q. Okay. You have no information --  
14 understanding you didn't talk to him, but you have no  
15 information at this point to say that he lacked  
16 rational as well as the factual understanding of the  
17 proceedings against him?

18 A. No, I don't have any information, period.

19 Q. Okay. That's all I was asking about, Doctor.  
20 Are you aware that Mr. Ramirez had been incarcerated  
21 at least in county jail for some time before he made  
22 the decision he did about mitigation?

23 A. Yes.

24 Q. Okay. In that period of time, it would have  
25 given him at least some indication about what life

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1 behind bars was like, wouldn't it, what the jail or  
2 prison culture was like?

3 A. To some degree.

4 Q. During your most recent visit, did  
5 Mr. Ramirez ever indicate to you that he wished he  
6 could have changed his decision at trial and instead  
7 presented mitigation evidence?

8 A. No.

9 Q. So he's been consistent about that, has he  
10 not?

11 A. I did not speak to him at length about that.  
12 But no, he did not say to me, "I made a bad decision,  
13 and I wish I changed my mind."

14 Q. And you have nothing to indicate that his  
15 reasons for making that decision might have been  
16 changed over time -- might have changed over time?

17 A. Well, I do have some information about that  
18 from the current mitigation specialist that in fact  
19 that opinion has changed, reversed, and changed again.  
20 So I think that as best I can understand it when  
21 Mr. Ramirez feels that he has family support and  
22 family contact that he considers that maybe life is  
23 worth living, and when he does not, he feels that it  
24 is not.

25 Q. We're talking about one change of decision,

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1 are we not, within the last couple of months?

2 A. I have not had contact with him since I  
3 finished my evaluation so I can't speak specifically  
4 to that.

5 Q. Okay. Did Mr. Ramirez during your  
6 discussions with him ever indicate that he was  
7 mistaken how about prison culture was? Did he ever  
8 indicate to you that it was not as bad as he thought  
9 it was going to be?

10 A. No, we didn't talk about that at all. He  
11 made a statement about, like, it being a trash life or  
12 something like that, but other than that, we did not  
13 discuss his incarceration.

14 Q. Okay. Now, Doctor, in your report on page  
15 42, I believe you mentioned Mr. Ramirez's statement  
16 that he decided not to ask the jury for the death  
17 penalty because he was afraid they might do the  
18 opposite. You mentioned that this was not a logical  
19 statement. Why is that not a logical statement?

20 A. I just don't see that asking a jury to put  
21 you to death would keep a jury from making a finding  
22 one way or the other.

23 Q. Well, isn't it logical to suppose that some  
24 jurors might feel sufficiently angry with Mr. Ramirez  
25 after the case had been presented against him that

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1 they would want to give him what he considered to be  
2 the harshest sentence, which in his mind would be a  
3 life sentence?

4 A. Well, I guess anything is possible, but I  
5 think most rational jurors would hopefully make a  
6 decision based on the evidence presented and the  
7 mitigating evidence and that's what they should make  
8 their decision on.

9 Q. So it is possible you could have some jurors  
10 out there who are angry with Mr. Ramirez who would  
11 want to give him what they consider the harshest  
12 sentence?

13 A. You could have that regardless.

14 Q. Okay. Are you aware that even if one juror  
15 was angry by some such feelings -- angry by such  
16 feelings, one juror could have changed the result, and  
17 Mr. Ramirez could have gotten the life sentence rather  
18 than the death sentence?

19 A. Sure, I'm aware of that.

20 Q. Okay. Doctor, is it rational as well for a  
21 defendant to want to spare his family embarrassment of  
22 coming in and testify in a trial like this?

23 A. Ask that question again.

24 Q. Sure. Isn't it rational for a defendant to  
25 want to spare his family of the embarrassment and pain

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1 of testifying in court and being subject to  
2 cross-examination?

3 A. I don't know the answer to that.

4 Q. Doctor, in your report you mentioned that  
5 Mr. Ramirez is not cognitively or intellectually  
6 impaired, but he may harbor distorted or even  
7 delusional beliefs. What sort of distorted or  
8 delusional beliefs are you referring to?

9 A. Well, there's a tremendous amount of  
10 cynicism. I think the things that I went over in the  
11 MMPI that, in fact, people may be out to do him harm  
12 when no harm is intended. He's very suspicious. That  
13 he sees things through the lens of an abused child,  
14 and that's how he views the world.

15 Q. You have no indication that he's delusional  
16 in a clinical sense, do you?

17 A. No.

18 Q. Okay. Doctor, it's normal for someone under  
19 death sentence to be depressed, wouldn't you agree?

20 A. Mostly, yes.

21 Q. So if you're comparing someone under a death  
22 sentence as opposed to someone who's, let's say in a  
23 normal situation, then you would expect that person to  
24 be more severely depressed, wouldn't you?

25 A. Yes.

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1 Q. Okay.

2 A. And not just the death sentence itself, but  
3 the circumstances that these people often find  
4 themselves in.

5 Q. Well, wouldn't it be, in fact, normal for  
6 them to be depressed?

7 A. Yes, actually, the biggest complaint is sleep  
8 disorders.

9 Q. You mentioned, Doctor -- if you look at the  
10 screen here -- the doctoral degree, and Dr. Martinez,  
11 I believe, you mentioned he had a PsyD. Would someone  
12 with a PsyD, wouldn't that qualify them to a greater  
13 extent to do counseling than, in fact, a  
14 research-oriented doctoral degree?

15 A. No.

16 Q. No?

17 A. No, my training was psychoanalytical. So I  
18 was very well-trained in the techniques of  
19 psychotherapy, but we also had to do a year of  
20 research, so like it or not, you do it.

21 Q. Would you agree that Dr. Martinez, his degree  
22 focused -- his degree focused, in fact, on the  
23 clinical counseling aspects of psychology?

24 A. Likely, I -- I don't know for sure his  
25 curriculum, but that's not likely.

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1 Q. So you don't really know what his curriculum  
2 was --

3 A. No, I'm just seeing his curriculum --

4 Q. -- what the requirements --

5 A. -- from his PsyD program.

6 Q. Okay. You have no training as a mitigation  
7 expert, do you?

8 A. I have no specific training as a mitigation  
9 expert. Obviously, I do C.E. hours and know some  
10 about that, but I would never take a job as a  
11 mitigating expert.

12 Q. Isn't it true that a mitigation case would be  
13 billed over time, and you would be continuing updating  
14 that, wouldn't it, even until the first of trial?

15 A. Yes, and I think it also -- the skill also  
16 has a lot to do with jury selection, which is an art  
17 or science to itself. And so, if you are going to do  
18 that, you need to be someone well-versed in all  
19 those elements. I know very little about jury  
20 selection.

21 Q. You couldn't point to any one particular  
22 thing that you've discovered during your analysis of  
23 Mr. Ramirez that would have been a key concept in  
24 mitigation that was not available to the defense team  
25 at the time he made the decision he did, can you?

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1 A. I don't know. I think that's a question for  
2 Mr. Byington because he has done the mitigation  
3 review; and whether he's uncovered additional  
4 information that was not available then, I do not  
5 know.

6 Q. Okay. But you can't as a psychologist -- as  
7 a forensic psychologist point to one smoking gun there  
8 and say, "Ah-ha, if he only had that it would have  
9 made a difference in the mitigation case," and it's  
10 clear he didn't have that?

11 A. No, I can't do that.

12 MR. NORMAN: Okay. I pass the witness,  
13 Your Honor.

14 THE COURT: Anything else?

15 MR. GROSS: No more questions, Your  
16 Honor.

17 THE COURT: All right. You're free to go  
18 about your business. Call your next witness.

19 MR. GROSS: Gerry Byington, Your Honor.

20 THE COURT: Okay.

21 MR. GROSS: Your Honor, can we take a  
22 brief five-minute comfort recess? He is my last  
23 witness today, and he should only last about an hour.

24 THE COURT: Yes, sir.

25 MR. GROSS: Cause after him all I have

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1 left, Your Honor, is the cross of Mr. Jones.

2 THE COURT: Okay. I mean, here's the  
3 thing, that's about what we have is about an hour.

4 MR. GROSS: Oh, okay.

5 THE COURT: Okay.

6 MR. GROSS: If we just have a real brief  
7 five--minute --

8 THE COURT: Yeah, okay.

9 THE BAILIFF: All rise.

10 (Brief recess.)

11 THE COURT: All right. Call your next  
12 witness.

13 MR. GROSS: Gerald Byington.

14 (Oath administered.)

15 THE COURT: All right. You may proceed.

16

17 GERALD BYINGTON,

18 having been first duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. GROSS:

21 Q. Would you please tell us your name, sir.

22 A. Gerald Byington.

23 Q. And what do you do for a living?

24 A. I'm a mitigation specialist.

25 Q. Could you please tell us your educational

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1 background.

2 A. I have a Bachelor's with a double major in  
3 political science and psychology, and a Master's  
4 degree in social work from the University of  
5 Wisconsin, Milwaukee.

6 Q. And what does your practice mainly involve  
7 currently?

8 A. At this point, for the last ten years, I've  
9 been doing -- providing mitigation to attorneys who  
10 are representing capital death penalty clients.

11 Q. And real approximately, real roughly, how  
12 many cases have you acted as the defense mitigation  
13 expert in a death case?

14 A. In excess of a hundred.

15 Q. Now, you heard the testimony by Dr. -- and at  
16 my request, you were appointed as the defense  
17 mitigation expert on this writ; correct?

18 A. Yes.

19 Q. And as a result of that, you conducted a  
20 mitigation investigation for me; correct?

21 A. Yes.

22 Q. And the attachments to the writ from the  
23 affidavits that -- Exhibit D through J that the Judge  
24 has taken judicial notice of already, are affidavits  
25 from Guadalupe Alejandro; Maria Hinojosa; John

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1 Ramirez, Sr.; Priscilla Martinez; Vicky Rivas; Ashley  
2 Ramirez; and Alex Hernandez. Those are all based upon  
3 your mitigation investigation in the case; correct?

4 A. Yes.

5 Q. And those affidavits correctly reflect the  
6 information that you obtained from those witnesses?

7 A. Yes.

8 Q. In fact, you're the one that drafted those  
9 affidavits; correct?

10 A. Yes. I drafted the affidavit, then I would  
11 send it back to the individual for corrections and  
12 additions, deletions, then I would put in there  
13 additions, deletions, and send it back to them until  
14 we got it to the form where they could sign it and  
15 notarize it.

16 Q. So these affidavits correctly reflect the  
17 information that you reviewed in records or obtained  
18 personally from witnesses in this case; correct?

19 A. Yes.

20 Q. Now, you heard the -- the testimony by  
21 Dr. Martinez, today; correct?

22 A. Yes.

23 Q. And you were present in the courtroom during  
24 all that testimony?

25 A. Yes.

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1 Q. Have you ever been involved in a case where  
2 the forensic psychologist was also the mitigation  
3 expert?

4 A. No, but that would be redundant if I'm the  
5 mitigation expert also having the psychologist who's  
6 involved in the case also be the mitigation expert,  
7 but I've never been in that situation.

8 Q. Have you ever heard of a case where the  
9 psychologist was also the mitigation expert?

10 A. This morning from Dr. Martinez.

11 Q. Is that the first time you ever heard of  
12 that?

13 A. Yes.

14 Q. What -- what types of continuing education  
15 courses have you taken regarding mitigation  
16 responsibilities?

17 A. Every year since 2000 I've attended the  
18 capital death penalty training seminar by N.A.D.L.A.,  
19 the National Legal Defense Association. I've gone to  
20 trainings on an annual basis here in Texas that are  
21 put on by either the Texas Defender Service or the  
22 Texas Criminal Defense Lawyers Association, and I  
23 usually go to at least two of those a year that are  
24 specifically about mitigation in capital cases.

25 Q. Would you agree with me that -- that the

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1 opinions of the -- of the mitigation community and the  
2 legal community is that there should be one person  
3 acting as the mitigation expert and one -- and a  
4 different person acting as the psychological expert?

5 A. Yeah. I think that's even somewhat codified  
6 in the American Bar Association Guidelines in Death  
7 Penalty Cases and the Texas Bar Association Guidelines  
8 in Death Penalty Cases.

9 Q. In fact, it is codified that way; correct?

10 A. Yes.

11 Q. Now, the -- the problems that can arise,  
12 you've seen Defendant's Exhibit 5 in this case, right,  
13 the report -- the file of Dr. Martinez?

14 A. Yes.

15 Q. And, for instance, that list of 20 witnesses  
16 that were identified by John Henry in the case, you  
17 saw that list; right?

18 A. Yes.

19 Q. In fact, you reviewed all of Dr. Martinez's  
20 file; correct?

21 A. Yes.

22 Q. Is -- is there a concern about the -- the  
23 standard of care or the level of quality of  
24 representation if only 5 of 20 witnesses are  
25 interviewed?

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1 A. Yes.

2 Q. And what is that concern?

3 A. The concern is that really the amount of  
4 information and the nature of information that's  
5 available to the Defense during the course of the  
6 capital trial only really becomes significant if you  
7 have a witness who can testify to that information and  
8 so if you have a list of -- like in this case, 20  
9 people, you would need to interview those people in  
10 terms of determining what information does an  
11 individual have, what firsthand information does an  
12 individual have that that individual could actually  
13 testify to so that they could present that information  
14 to the jury.

15 With a list of 20 individuals in  
16 attempting to have the most impact with a juror, you  
17 want to pick the best witness to present the testimony  
18 that you want to present.

19 Q. You -- you saw in this case, the -- Defense  
20 Exhibit 10, I believe it is, the -- the summary chart  
21 of -- of Dr. Martinez's work in this case; correct?

22 A. Yes.

23 Q. In fact, you're the one that looked through  
24 all the records and compiled this chart; correct?

25 A. Yes.

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1 Q. Have you -- does it cause you any concerns,  
2 the fact that the mitigation investigation in this  
3 case did not begin interviewing witnesses until after  
4 jury selection began?

5 A. Yes.

6 Q. Why does that cause you concern?

7 A. A thorough mitigation investigation needs to  
8 result in a strategy for punishment, and that strategy  
9 for punishment needs to be available for the defense  
10 team prior to jury selection because there's  
11 information in that strategy for punishment that the  
12 attorneys are going to need to use in order to select  
13 appropriate jurors to hear that punishment case. And  
14 so if you don't have that information accumulated and  
15 known in terms of what information are we actually  
16 going to be able to present to the jury through some  
17 specific witness prior to jury selection, you can't --  
18 the attorney's in a situation where they can't really  
19 evaluate the juror for "Are they an appropriate jury  
20 for this case in punishment?"

21 Q. Now, you saw the writ that I put together in  
22 this case; correct?

23 A. Yes.

24 Q. And you saw my summaries of what trial  
25 Defense Counsel questioned the veniremen on for jury

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1 selection in the writ. Do you agree that nowhere in  
2 jury selection did the trial Defense Counsel ask the  
3 prospective jurors any questions regarding their  
4 feelings about a case that would have facts such as  
5 John Henry's?

6 A. From reviewing the transcript, it appears to  
7 be that way.

8 Q. Now, you also reviewed the -- the vouchers  
9 for trial Defense Counsel; correct?

10 A. Yes.

11 Q. Did you notice in there at any time that  
12 trial Defense Counsel recorded having interviewed any  
13 mitigation witnesses?

14 A. I noticed one interview with -- I believe it  
15 was the maternal grandmother between the attorneys and  
16 a potential mitigation witness.

17 Q. And was that during jury selection?

18 A. I believe it was after jury selection.

19 Q. Have you as a mitigation specialist ever been  
20 involved with the attorneys during jury selection?

21 A. Yes.

22 Q. How so?

23 A. Usually, I'm involved with the attorneys in  
24 the process of identifying characteristics of  
25 potential jurors that may assist us in the process of

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1 a punishment hearing or may be detrimental to us in  
2 the process of a punishment hearing.

3 Q. In other words, compiling a juror profile  
4 that would reflect who would be most sympathetic to  
5 the facts of your case?

6 A. Yes.

7 Q. Now, did you find any indication in the  
8 records of Dr. Martinez or the records of Dr. --  
9 Mr. Jones or Mr. Garza that that was ever done in this  
10 case?

11 A. No.

12 Q. Did you see any records at all when you --  
13 you've seen the -- the C.D. that's in evidence of  
14 Mr. Jones's file. There is absolutely no recording at  
15 all of any idea of the strategy for mitigation;  
16 correct?

17 A. No.

18 Q. And so you haven't -- have you seen anything  
19 in anyone's file in this case where they had a  
20 strategy for the sentencing phase in this case?

21 A. No.

22 Q. Now, are there two different paths of  
23 strategies on a death penalty sentencing case? In  
24 other words, future dangerousness and mitigation?

25 A. Actually, in those terms, I would say there

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1 are three different strategies. The first strategy is  
2 to address those issues that are going to be brought  
3 by the State in the 404(b) issues, and then there are  
4 what kind of information are you going to present  
5 during the -- directed at the issue of future  
6 dangerousness, and what information -- what witnesses  
7 and information are you going to present regarding the  
8 mitigation issue, the moral blameworthiness issue.

9 Q. How -- how do you focus, as an mitigation  
10 expert, helping the defense on future dangerousness?  
11 What do you look at? State's witnesses?

12 A. We both look at State's witnesses in terms  
13 of -- oftentimes the -- the charge that someone has  
14 been charged with is not totally reflected of the  
15 circumstances in which that charge occurred. And so  
16 there may be some exploration that you want to do as  
17 the mitigation expert in terms of talking to witnesses  
18 about what actually occurred, what was actually going  
19 on during the course of that incident that is going to  
20 lead to the State's witness that is being put on. You  
21 also want to -- in terms of future dangerousness, you  
22 want to identify witnesses who can testify about the  
23 whole history of the person in terms of both their  
24 tendency for aggressiveness in terms of what elicits  
25 that tendency for aggressiveness, as well as their

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1 tendency for being kind, considerate of others.

2 Q. The -- during jury selection, does a  
3 mitigation expert help the defense in deciding how to  
4 best qualify a juror for the death sentence in a given  
5 case?

6 A. Yes. In terms of providing a -- information  
7 about potential juror profile or characteristics that  
8 you are looking for, know in terms of -- I usually  
9 don't come to jury selection and actively participate  
10 with the attorneys on deciding about an individual  
11 juror. There's enough going on there with -- without  
12 me being there.

13 Q. Now, you read the -- the first day of the  
14 punishment proceedings in this case, Volume 21 of 25;  
15 correct?

16 A. Yes..

17 Q. You saw in there where the rule was invoked;  
18 correct?

19 A. Yes.

20 Q. And you saw there where Defense Counsel said  
21 that the witnesses would be Ashley Ramirez; Maria  
22 Hinojosa; John Henry Ramirez, Sr.; Lupita Alejandro;  
23 who is in all likelihood Guadalupe Alejandro. You saw  
24 those names; right?

25 A. Yes.

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1 Q. And you spoke to Ashley Ramirez; right?

2 A. Yes.

3 Q. And what did she say about trial Defense  
4 Counsel ever talking to her before trial?

5 MR. NORMAN: Objection, that would be  
6 hearsay, Your Honor.

7 MR. GROSS: Well, it's in her affidavit,  
8 Your Honor, and you've already taken judicial notice  
9 of it.

10 THE COURT: It will be -- yeah, it's  
11 still hearsay at this point, so that's sustained.

12 MR. GROSS: I'll offer it as a bill, just  
13 so --

14 THE COURT: All right.

15 MR. GROSS: -- I won't take too long.

16 Q. (BY MR. GROSS) As a bill of exception, what  
17 did Ashley Ramirez tell you that trial Defense --  
18 about contact with trial Defense Counsel prior to her  
19 being listed as a witness on December 5th, 2008?

20 A. She said that the attorneys had spoken to her  
21 briefly out in the hall.

22 Q. That day?

23 A. That day.

24 Q. For about five or ten minutes?

25 A. Right.

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1 Q. And Maria Hinojosa, what did she say about  
2 that?

3 MR. NORMAN: I'm sorry, Your Honor, but  
4 can I have a running objection on these?

5 THE COURT: Yes, sir. So you object this  
6 is hearsay as well?

7 MR. NORMAN: Exactly.

8 THE COURT: All right. Do you have any  
9 response, Mr. Gross?

10 MR. GROSS: Well, it's not offered for  
11 the truth -- well, I guess it is. It's offered for  
12 the truth, Your Honor, but since the Court's already  
13 taken judicial notice of it and it's in that person's  
14 affidavit -- I guess, I could do it easier. I will  
15 rephrase, Your Honor.

16 THE COURT: Okay.

17 Q. (BY MR. GROSS) I'll try it this way: All  
18 these witnesses' affidavits that you prepared that are  
19 attached to my writ, Mr. Byington -- okay, you follow  
20 me?

21 A. Yes.

22 Q. All of these witnesses, what they say about  
23 their contact with trial Defense Counsel prior to  
24 trial beginning came directly from them; right?

25 A. Yes.

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